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No. 87-153

In the Supreme Court of the United States

OCTOBER TERM, 1987

MR. W. FIREWORKS, INC., PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the correct standard of review when it held numerous factual findings of the district court to be clearly erroneous or legally irrelevant and reversed the district court on the ultimate question of whether petitioner's fireworks stand operators are "employees," rather than "independent contractors," for purposes of the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. III) 201 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A60) is reported at 814 F.2d 1042. The memorandum opinion of the district court (Pet. App. A63-A79) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A61-A62) was entered on April 20, 1987. The petition for a writ of certiorari was filed on July 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a corporation that imports fireworks from Asia. The fireworks are then sold at some 100 stands that petitioner owns throughout south Texas (Pet. App. A13, A15). Petitioner leased the land on which the stands were located after first checking local fireworks ordinances and conducting market and demographic surveys (*id.* at A14, A68). The stands were built by petitioner at its

warehouse, were painted a common color with petitioner's logo, and were transported to the locations selected by petitioner (*id.* at A14-A15). Petitioner procured licenses and insurance for all the stands and paid for their electricity (*id.* at A15, A68). Petitioner also paid for newspaper advertisements both to recruit stand operators and to increase business at all the stands (*id.* at A15, A71).

Petitioner recruited the operators at the beginning of each selling season, which, by Texas law, is restricted to a 13-day period preceding January 1 and an 11-day period preceding July 4 (Pet. App. A13, A77). In any given season, approximately 80% of the operators were new recruits (*id.* at A53, A77), although none was ever terminated in the middle of a season (*id.* at A55). Petitioner gave each operator a choice of locations on a first-come, first-served basis, with priority given to past operators (*id.* at A68).

Petitioner entered into a standard contract with each operator, which set forth certain rules and regulations by which the operators were expected to abide (Pet. App. A16, A66). Before 1983, the contract set hours and prices and prohibited the sale of merchandise not provided by petitioner; otherwise, it gave the operators sole control of their day-to-day operations (*id.* at A17, A66). After 1983, following an investigation by the Wage and Hour Division of the U.S. Department of Labor, the contract was modified so that the hours of operation (9 a.m. to midnight) became "suggested" and the prohibition on the sale of other merchandise was removed (*id.* at A17, A67). The terms of the pre-1983 contract, however, apparently were not enforced (*id.* at A17-A18, A67, A73), and introduction of the newer, more flexible contract "did not affect the operation of the stands" (*id.* at A70).

Petitioner provided each operator with an inventory of fireworks, filled additional orders as needed, and collected the cash from the operators (Pet. App. A68-A69). The

initial inventory came with price tags, a suggested price list, and suggested display instructions (*id.* at A18, A70-A71). The operators could deviate from the "suggested" prices, but most never did so (*id.* at A23-A24, A70). Similarly, only a few of the operators sold any merchandise other than petitioner's fireworks (*id.* at A30-A31, A72), and one testified that he did not follow the suggested display instructions (*id.* at A27, A71). There was also some deviation from the suggested hours of operation (9 a.m. to midnight), but none from the requirement, imposed by petitioner in accordance with its understanding of applicable state law, that the operator or a helper be on the premises 24 hours a day (*id.* at A25-A26, A70-A71).

The operators received the merchandise without having to pay any money in advance (Pet. App. A47). They returned any unsold merchandise, and most were paid a commission of 15% on the merchandise that was sold (*id.* at A19-A20, A47-A48, A69). The operators bore the cost of any losses resulting from theft or other causes (*id.* at A20, A38, A74). The operators were also responsible for hiring and paying any other persons who worked at the stands (*id.* at A46, A72), the majority of whom were family members (*id.* at A47, A78). In other respects, "many vendors made little or no investment" (*id.* at A76), but "many operators, in particular those who were most successful, invested their own money in the business" (*id.* at A75). Thus, a number of operators incurred additional expenses by purchasing or providing such miscellaneous items as their own advertising, trash removal, coverings for muddy areas, portable toilets, sleeping quarters, security systems, and office supplies (*id.* at A41-A44, A75-A76). Several of these items, however, were originally purchased for purposes unrelated to operating the fireworks stands (*id.* at A42-A46). In addition, petitioner reimbursed the operators for some of their advertising and other expenses (*id.* at A75).

2. The Secretary of Labor brought suit against petitioner, alleging continuing violations of the recordkeeping, minimum wage, and overtime provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. III) 201 *et seq.* (Pet. App. A2, A63). Petitioner defended against the allegations on the ground that the stand opertors are independent contractors, not employees (*id.* at A64).[1] The district court ruled in favor of petitioner in a memorandum decision that did not distinguish between findings of fact and conclusions of law (*id.* at A63-A79).

The district court considered five factors, derived from *United States* v. *Silk*, 331 U.S. 704, 716 (1947),[2] to help it determine, based on the totality of the circumstances, whether the "dominant factor" in determining employment status—"economic dependence"—was present in this case: degree of control, opportunities for profit and loss, investment in facilities, skill required, and permanence of relationship (Pet. App. A65-A66).[3] The court concluded, based on its examination of the record evidence, that all of these factors indicated independent contractor status (*id.* at A79):

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[1] Petitioner also argued (see Pet. App. A59) that its stands are exempt from coverage under the Act as "amusement or recreational" establishments (see 29 U.S.C. 213(a)(3)), and that the operators, even if employees, fall within the "outside salesman" exemption to the Act (see 29 U.S.C. 213(a)(1)). Petitioner further argued that the commissions received were sufficient to discharge any liability under the Act (see 29 U.S.C. 207(i); Pet. 6). The district court did not reach these questions, and the court of appeals remanded for their consideration (Pet. App. A59-A60).

[2] In *Silk*, these factors were first applied to a determination of employee status in the context of the Social Security Act.

[3] The court defined "economic dependence" in the following terms: "an employee is one who as a matter of economic reality is dependent upon the business to which he renders service" (Pet. App. A65).

> The vendors exercise the control and have the opportunity for profit and loss indicative of an independent contractor. Many of them invest their own money and initiative to increase their profit. Experience increases skill which also raises profit. Most importantly, none of the vendors make a living selling fireworks.

Moreover, the court held that economic dependence had not been established because none of the operators "relied upon the income from such [fireworks] sales for their livelihood" (*id.* at A77-A78). Thus, in the court's view, "[w]hile 'employee' under the FLSA is given an expansive definition, it cannot be stretched to include the members of these family-operated businesses" (*id.* at A78-A79).

3. The court of appeals reversed and remanded (Pet. App. A1-A60). The court first noted that the five-part *Silk* test used by the district court was appropriate (*id.* at A4, A21). The court of appeals cautioned, however, that these five factors must not be applied mechanically, but rather "must always be aimed at an assessment of the 'economic dependence' of the putative employees, the touchstone for this totality of the circumstances test" (*id.* at A5).

The court further stated that there are "three types of findings involved in determining whether one is an employee within the meaning of the [FLSA]": (1) "historical findings of fact" (*e.g.*, whether petitioner controlled the number of hours that an operator must be at a stand); (2) "those findings as to the *Silk* factors themselves"; and (3) the "ultimate conclusion" as to whether the workers at issue are "employees" or "independent contractors" (Pet. App. A7-A11). Explicitly relying on *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709 (1986), the court stated that historical facts and findings related to the *Silk* factors are subject to the "clearly

erroneous" standard of review,[4] but that "the ultimate finding as to employee status * * * is a legal conclusion * * * subject to *de novo* consideration by this court" (Pet. App. A11).

After "carefully canvassing the entire record" (Pet. App. A21), the court concluded that a number of important district court findings were clearly erroneous. On the issue of control, the court held that "[t]he entire record clearly and unmistak[ably] demonstrates that all 'meaningful' aspects of this business are controlled by [petitioner] and that the operators are economically dependent on [petitioner]. Indeed, the operators could not function without [petitioner]." *Id.* at A34-A35. On the issue of opportunity for profit and loss, the court held that "the opportunity for profit and loss is controlled mainly by [petitioner], and that this factor points to economic dependence" (*id.* at A40). On the issue of investment, the court held that "the overwhelming majority of the risk capital is supplied by [petitioner]" (*id.* at A45); paraphrasing *Usery* v. *Pilgrim Equip. Co.*, 527 F.2d 1308, 1314 (5th Cir.), cert. denied, 429 U.S. 826 (1976), the court also observed that, "[b]ut for [petitioner's] provision of all costly necessities, these operators could not operate" (Pet. App. A50). On the issue of skill and initiative, the court held that "the operators did not exhibit sufficient independent skill or initiative to indicate that they were independent contractors" (*id.* at A52). On the issue of permanence, the court held that the operators' relationship to

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[4] Citing *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948), the court characterized that standard, prescribed by Fed. R. Civ. P. 52(a), as permitting it to set aside factual findings of the district court only "if we have a firm and definite conviction that a mistake has been made" (Pet. App. A9). The court added two caveats to this precept: first, the standard "must not serve as an excuse to avoid comprehensively canvas[s]ing the record with great care," and second, "we must ensure that the factfinding of the district court is performed with the proper legal standards in mind" (*id.* at A9-A10).

petitioner was permanent because they worked for the entire operative period of the fireworks season (*id.* at A54-A55).

The court of appeals also held that the district court's ultimate conclusion on the question of economic dependence was wrong as a matter of law because the district court overemphasized its erroneous finding regarding the impermanence of the employment relationship to the virtual exclusion of all other factors. Moreover, the court of appeals regarded the lower court's understanding of "economic dependence" as flawed (Pet. App. A51). Specifically, the district court failed to consider that, in a seasonal business, economic dependence does not require "reliance on an alleged employer for one's primary source of income" but requires examination, in light of all the circumstances, of " 'whether the workers are dependent on a particular business organization for their continued employment' in that line of business." Pet. App. A57 (quoting *Donovan* v. *DialAmerica Mktg.*, 757 F.2d 1376, 1385 (3d Cir.), cert. denied, 474 U.S. 919 (1985)). The court concluded that, judged by this legal standard, the fireworks stand operators were employees, not independent contractors, because they were economically dependent on petitioner and "not in business for themselves" (Pet. App. A59).[5]

ARGUMENT

The court of appeals applied the appropriate standards of review and reached the correct legal conclusion. The decision does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

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[5] The court also held that "even were employee status a question of fact subject to the clearly erroneous standard of review, we would be compelled to find these operators to be employees" (Pet. App. A58).

1. The FLSA was enacted in 1938 to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" (29 U.S.C. 202; see *Mitchell* v. *Robert DeMario Jewelry*, 361 U.S. 288 (1960)). The Act accomplishes this goal principally by raising substandard wages and by giving additional compensation for overtime work to those employees within its ambit. 29 U.S.C. 206, 207; *United States* v. *Rosenwasser*, 323 U.S. 360, 361 (1945); *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 727 (1947). As remedial social legislation, the FLSA must be liberally interpreted " 'to apply to the furthest reaches consistent with congressional direction.' " *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell* v. *Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)). At the same time, exemptions from the FLSA's requirements are appropriate only if they are " 'plainly and unmistakably within [the FLSA's] terms and spirit.' " *Citicorp Indus. Credit, Inc.* v. *Brock*, No. 86-88 (June 22, 1987), slip op. 8 (quoting *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945)).

In keeping with its purpose, the FLSA defines "employee" and "employ" in the broadest possible terms. See 81 Cong. Rec. 7657 (1937) (remarks of Sen. Hugo L. Black) (the term "employee" has been given "the broadest definition that has ever been included in any one act"); *Alamo Found.*, 471 U.S. at 295; *Rutherford*, 331 U.S. at 728; *Rosenwasser*, 323 U.S. at 362-363.[6] As this Court has

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[6] Section 3 of the Act, 29 U.S.C. (& Supp. III) 203, includes these definitions:

> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *.
>
> (e)(1) * * * "[E]mployee" means any individual employed by an employer.
>
> * * * * *
>
> (g) "Employ" includes to suffer or permit to work.

said, "in determining who are 'employees' under the [FLSA], common law employee categories or employer-employee classifications under other statutes are not of controlling significance. * * * This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category." *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150-151 (1947). Accordingly, it is the "economic reality" of the relationship, and not labels derived from prior contract or custom, that determines employee status under the Act. *Alamo Found.*, 471 U.S. at 301; *Goldberg* v. *Whitaker House Coop.*, 366 U.S. 28, 33 (1961); cf. *Silk*, 331 U.S. at 713.

Broad as it is, however, the FLSA "is not so broad as to include those 'who, without any express or implied compensation agreement, might work for their own advantage on the premises of another' " (*Rutherford*, 331 U.S. at 728-729 (quoting *Portland Terminal Co.*, 330 U.S. at 152)). Independent contractors are therefore excluded from its coverage (*Rutherford*, 331 U.S. at 722). To distinguish between employees and independent contractors, courts have frequently considered the factors of control, opportunity for profit and loss, skill and initiative, investment, and permanence first applied by this Court in *Silk*.[7] See, *e.g.*, *Rutherford*, 331 U.S. at 722-723, 729-731; *DialAmerica Mktg.*, 757 F.2d at 1382; *Donovan* v. *Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981); *Robicheaux* v. *Radcliff Material, Inc.*, 697 F.2d 662, 666 (5th Cir. 1983); *Pilgrim Equip. Co.*, 527 F.2d at 1311; *Donovan* v. *Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir.

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[7] A sixth factor—whether the service rendered is an integral part of the alleged employer's business—has sometimes been separately identified. *DialAmerica Mktg.*, 757 F.2d at 1382; *Donovan* v. *Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981); see also *Silk*, 331 U.S. at 716; *Rutherford*, 331 U.S. at 722.

1981). But "[n]o one [factor] is controlling nor is the list complete" (*Silk*, 331 U.S. at 716). Instead, "[w]hether an employer-employee relationship exists depends 'upon the circumstances of the whole activity,' * * * and, ultimately whether, as a matter of economic reality, the individuals 'are dependent upon the business to which they render service.' " *Sureway Cleaners*, 656 F.2d at 1370 (quoting *Rutherford*, 331 U.S. at 730, and *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947)); accord *DialAmerica Mktg.*, 757 F.2d at 1382; *Pilgrim Equip. Co.*, 527 F.2d at 1311.

2. Petitioner's primary argument (Pet. 14-25) is that the court of appeals misapplied the clearly erroneous standard in reversing a number of the district court's findings of fact. To the contrary, the court of appeals faithfully followed this Court's precedent in limiting its scrutiny to patent errors.

In applying the "clearly erroneous" standard, the court of appeals was guided (see Pet. App. A9) by the principle that " '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The court (Pet. App. A9) further recognized that the "clearly erroneous" standard does not preclude an appellate court from "canvas[s]ing the record." Rather, the Rule 52(a) standard invites a comprehensive reading of the record to determine whether, "although there is evidence to support [them]," the district court's findings were mistaken "on the entire evidence" (*United States Gypsum Co.*, 333 U.S. at 395, *quoted in Anderson*, 470 U.S. at 573; see *Bose Corp.* v. *Consumers Union of United States*, 466 U.S. 485, 499 (1984) ("Rule 52(a) never forbids such an examination" of the entire record)). Although it is not the reviewing court's role to reverse a decision simply because it would have weighed the evidence differently,

scrutiny of the entire record nevertheless is necessary for the court of appeals to determine faithfully whether the district court's view of the evidence is a permissible one (see *Anderson,* 470 U.S. at 574). Indeed, in *Anderson,* this Court itself reviewed the record carefully before determining that the court of appeals had exceeded its review function, and Justice Powell noted, in concurrence, that *Anderson* should not be read "as implying criticism of the Court of Appeals for the very fact that it engaged in a comprehensive review of the entire record of this case" (*id.* at 581).

The court of appeals in this case, after a careful review of the record and applicable legal precedent, formed the "definite and firm conviction" that many of the district court's factual findings were mistaken or, in several instances, irrelevant or based on erroneous legal standards (Pet. App. A21-A22, A35). Indeed, the court's close examination of the district court's findings convinced it that the trial court had drawn impermissible inferences as to each of the five *Silk* factors. These, in the court's judgment, could only be characterized as clearly erroneous (see *id.* at A34-A35, A37, A40, A48-A51, A55). The court of appeals therefore determined that the "entire evidence" regarding each of the *Silk* factors pointed in only one direction, toward a finding of economic dependence.

Thus, there is no merit in petitioner's contention (Pet. 23) that the court of appeals simply "duplicate[d] the role of the district court and engage[d] in its own fact finding." On the contrary, the court of appeals reversed the district court's findings only when the record "clearly and unmistak[ably]" demonstrated that those findings were in error (see Pet. App. A34 (regarding factor of control)); *id.* at A50 ("having reviewed the entire record, we are left with no doubt" on the factor of investment); *id.* at A51 ("the record [on skill and initiative is] unmistakab[le]"); *id.* at A55 ("the record establishes beyond cavil" the factor of

permanence)). Typical of the court's methodology is its analysis of the district court's finding (*id.* at A71) that, "[a]lthough the initial inventory came with suggested display instructions, the operators could and did alter the display depending upon what they felt would work best." On reading the record, the court of appeals discovered that "[s]ix operators unequivocally testified that they followed [petitioner's] display instructions to the letter; only one testified that he did not follow them" (*id.* at A27). Therefore, the court of appeals reasonably concluded that the district court's finding on this point was clearly erroneous. The fact that the court of appeals found many such errors throughout the district court's decision does not mean that the "clearly erroneous" standard was not being properly applied, but only that the district court had drawn mistaken inferences from the record on numerous occasions.

Furthermore, as in *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982), the court of appeals "was quite right in saying [see Pet. App. A10] that [to the extent the] district court's findings rest on an erroneous view of the law, they may be set aside on that basis." See also *Bose Corp.*, 466 U.S. at 501 ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law."); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982); *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963). We recognize, of course, that, "[w]hen an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings" (*Pullman-Standard*, 456 U.S. at 291; see also *Icicle Seafoods*, 475 U.S. at 714). But

remand was unnecessary in this case since "the record permits only one resolution of the factual issue" (*Pullman-Standard,* 456 U.S. at 292 (citing *Kelley* v. *Southern Pac. Co.,* 419 U.S. 318, 331-332 (1974)); accord *Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 534-537 (1979); *Bigelow* v. *Virginia,* 421 U.S. 809, 826-827 (1975); *Levin* v. *Mississippi River Fuel Corp.,* 386 U.S. 162, 170 (1967)).[8] Having found that the district court's decision rested on an erroneous view of the law and was factually unsupported, the court of appeals was correct to reverse, thereby bringing its decision into line with abundant precedent that had been established in analogous cases. See, *e.g., Usery* v. *Pilgrim Equip. Co., supra; Donovan* v. *DialAmerica Mktg., supra; Donovan* v. *Sureway Cleaners, supra;* see also *Donovan* v. *Brandel,* 736 F.2d 1114 (6th Cir. 1984).

3. Petitioner further argues (Pet. 25-29) that the determination by the court of appeals that the ultimate question of employee status is a question of law subject to de novo review is contrary to the holding of *Icicle Seafoods.* Petitioner has misunderstood that decision.

At issue in *Icicle Seafoods* was whether individuals who performed maintenance on a vessel that processed fish fell within the "seaman" exception to the FLSA (see 29 U.S.C. 213(b)(6)). The court of appeals, reversing the judgment of the district court, held that those individuals were industrial maintenance employees and not seamen. The court of appeals first enunciated a different legal standard for

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[8] A determination, like the one made by the court below, that the record yields only one permissible interpretation must be made on the "entire record," viewed in light of the proper legal determinations, and does not require a remand simply because there is some "evidence to support [the district court's decision]." See *Anderson,* 470 U.S. at 564; *United States Gypsum Co.,* 333 U.S. at 395.

what constitutes a "seaman" (475 U.S. at 713).[9] Applying that standard to the evidence in the record, the court found that plaintiffs were not seamen because their " 'dominant employment' * * * was 'industrial maintenance,' and that the 'maritime work' that [they] performed took but a small portion of their work time" (*ibid.*).

This Court, in turn, reversed the court of appeals because it had engaged in its own de novo factfinding under the different legal standard that it had adopted (*Icicle Seafoods,* 475 U.S. at 714).[10] Contrary to petitioner's assertion (Pet. 26-28), however, this Court did not suggest that the ultimate issue of the applicability of an FLSA exemption is other than a legal question. Indeed, the Court explicitly stated (475 U.S. at 714):

> The question of how the respondents spent their working time on board the [vessel] is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law.

The court of appeals was thus to be faulted not for rendering judgment on the ultimate legal issue of whether the exemption applies, but for making its own findings on

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[9] "The Court of Appeals seems to have believed that the District Court applied the wrong legal standard for what constitutes a 'seaman' under § 213(b)(6). Whereas the District Court concluded that respondents were seamen because they performed work of a maritime character on navigable waters, * * * the Court of Appeals held that under the pertinent regulations, the critical factor for determining whether an employee on a vessel is a seaman is whether his 'duties primarily aid navigation of the vessel.' " *Icicle Seafoods,* 475 U.S. at 713.

[10] This Court particularly faulted the court of appeals because "nowhere in its opinion did the court ever mention any of the factual findings of the District Court, much less discuss or analyze them" (*Icicle Seafoods,* 475 U.S. at 713). The present case obviously stands on a far different footing.

those facts necessary to a proper determination of that legal question.

This is especially clear from the Court's discussion reconciling its own prior decisions in *Rutherford Food Corp.* v. *McComb, supra,* and *Walling* v. *General Industries Co.,* 330 U.S. 545 (1947). The Court explained that in *Rutherford* it had engaged in de novo review because the focus was on a "legal question"—*i.e.,* whether, on the entire record, the individuals were independent contractors for purposes of the FLSA—and the case was not concerned with "the allocation of fact-finding responsibilities between district courts and courts of appeals" (*Icicle Seafoods,* 475 U.S. at 713). In *General Industries,* on the other hand, the holding was that "the facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies in a particular case should be reviewed by the courts of appeals pursuant to Rule 52(a)" (*Icicle Seafoods,* 475 U.S. at 713). In reaffirming *General Industries,* the Court thus distinguished sharply between the ultimate legal issue of whether an FLSA exemption applies, and the finding of "the facts necessary" to the making of that determination, which is done initially by the district court subject to appellate review under the "clearly erroneous" standard. Accordingly, the court of appeals was entirely correct to conclude that *Icicle Seafoods* "strongly support[s]" (Pet. App. A12) the position that it has taken here and in previous cases (see, *e.g., Beliz* v. *W.H. McLeod & Sons Packing Co.,* 765 F.2d 1317, 1327 & n.24 (5th Cir. 1985)) that "the ultimate determination of employee status is a finding of law subject to *de novo* consideration by this court" (Pet. App. A11).[11]

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[11]Petitioner complains (Pet. 28) that the court of appeals rejected prior Fifth Circuit cases holding that employee status is a question of fact. Whatever the merits of that contention (which petitioner chose not to advance in a petition for rehearing or suggestion of rehearing en

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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banc), it is a matter for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, there is no intracircuit conflict, because the holdings of the cases that petitioner cites regarding the standard of review had already been rejected by the Fifth Circuit in *Beliz*, 765 F.2d at 1327 & n.24, and, in any event, are contrary to *Icicle Seafoods*. See Pet. App. A11-A12.

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